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No. 77-1612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

DAVID STIRLING, JR., ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY BRIEF FOR THE PETITIONERS

ERWIN N. GRISWOLD
THOMAS F. CULLEN, JR.
LINDA K. SMITH

BERNARD S. MEYER
JEFFREY G. STARK

Attorneys for Petitioners

Of Counsel:

JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

MEYER, ENGLISH, CIANCIULLI
& PEIRIZ, P.C.
160 Mineola Boulevard
Mineola, New York 11501

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REPLY BRIEF FOR THE PETITIONERS

The government's brief in opposition gives only routine treatment to the questions carefully and fully raised in the petition. This reply is offered to clarify the central points at issue in five areas covered by the petition.

I. SELF INCRIMINATION

Protection against inquisitorial use of the powers of government is the central guarantee of the self-incrimination clause of the Fifth Amendment. Subversion of that guarantee is precisely the issue raised by the petitioners here.

The off-hand response to the petitioners' constitutional claim by the government and the court of appeals below raises the threat of inquisitorial use of governmental power in three ways: (a) denial of any

relevance to the Fifth Amendment in the context of broadly directed regulatory information gathering schemes; (b) unrealistic appraisal of the "compulsion" necessary to implicate the Fifth Amendment; and (c) bypassing any serious attempt to assess or balance the personal and regulatory interests involved.

A. The government and the court of appeals below maintain that the Fifth Amendment only has relevance to regulatory reporting schemes if they are narrowly directed at an "inherently suspect" group in a field "permeated with criminal statutes." These were of course the circumstances in *Marchetti* v. *United States*, 390 U.S. 39 (1968), in which this Court held that the circumstances justified total refusal to comply with the regulatory reporting requirement.

But these circumstances cannot be the only ones in which a valid Fifth Amendment claim can be raised in the regulatory context, despite the holding of the court of appeals, and the position of the government. Pet. p. 20, n. 26. The Fifth Amendment would thereby be limited to protecting citizens from only the most transparent attempts to use regulatory statutes for prosecutorial, inquisitorial purposes. The greater danger is the situation presented here, where an otherwise valid regulatory reporting scheme is expanded to include requirements whose purpose is purely or predominantly inquisitorial. The issue is important because of the tendency reflected below to interpret the *Marchetti-Grosso*[1]*-Byers*[2] line of cases

[1] *Grosso* v. *United States*, 390 U.S. 62 (1968).

[2] *California* v. *Byers*, 402 U.S. 424 (1971).

mechanically and restrictively to the detriment of Fifth Amendment values.

B. Compulsion, in the simplest terms, is being required to do something on pain of penalty. This prosecution in itself would seem to refute any contention that petitioners were not under compulsion to reveal past crimes. Nonetheless, in support of its view that there was no compulsion here, the government cites a pair of cases holding only that a privilege to remain silent is not a privilege to lie (*see Bryson* v. *United States*, 396 U.S. 64 (1969); *United States* v. *Mandujano*, 425 U.S. 564 (1976)), and another case which stands for the proposition that the proper time to assert the Fifth Amendment privilege is at the time the incriminatory information is sought, *Garner* v. *United States*, 424 U.S. 648 (1976). The government asserts that petitioners could somehow have made satsifactory disclosures without self-incrimination or that, among several alternatives open to them, they chose misleading disclosure.

These arguments stray far from the facts. Petitioners' public representations concerning their labor relations were wholly accurate, not lies like the testimony involved in *Bryson* and *Mandujano*. Petitioners stated that current labor relations were stable but that no assurances could be given about the future. See Pet. pp. 7-8. The stock transactions with union officials which formed the basis for petitioners' indictments under the Taft-Hartley Act are perfectly consistent with this general statement, no matter how black the government paints those transactions. There is simply no basis for maintaining that the details

omitted are material unless they are material precisely because they reflect illegality.[a]

The government and the court of appeals maintain that petitioners "chose" to mislead the public. The reasoning is that petitioners were not compelled to discuss labor relations, but once they did so, they were obligated to do so truthfully. This argument is a pyramid of errors:

First, petitioners' representations were truthful.

Second, from the viewpoint of materiality and the interests of the investing public, it cannot fairly be maintained that the public would have been better informed with no labor information rather than the fair current assessment and future caution which the petitioners provided.

Third, petitioners did not "choose to lie." They thought they were telling the truth; and they did not and could not know of the expansion of the concept of materiality which would make bland statements of fact tantamount to criminal fraud. Pet. pp. 28-29. Petitioners did not have the knowledge or the choice available in *Garner* v. *United States, supra,* where the taxpayer/gambler presumably knew the impact of his admission on his tax return that he was a gam-

[a] The government cites the discussion of the court of appeals on the evidence as a whole, and on the evidence relating to proof of conspiracy, as proof that the court of appeals did not construe the illegality of petitioners' actions as the reason those actions were material. Brief in Opposition, p. 8. The discussion makes no mention of materiality. Where materiality is discussed by the court of appeals, the illegality of petitioners' conduct is clearly adduced as the support for the contention that the petitioners' omission to discuss that conduct was material. Pet. App. 38a; Pet. pp. 18, n.23; 26-30.

bler, and chose to make the admission rather than assert a claim of privilege or remain silent. The petitioners here had no comparable choice, and there is no basis for a claim that petitioners made a "knowing and intelligent" waiver of their rights in these circumstances. *See Mandujano, supra,* 425 U.S. at 584-609. (Brennan, J., concurring).

Prosecution of the petitioners in these circumstances denies them any way to comply with the government's reporting scheme without direct self-incrimination, an alternative which this Court found to be available to the gambler in *Garner,* 424 U.S. at 661, n.15, and the motorist in *Byers,* 402 U.S. at 431 (Burger, J., for the plurality); 402 U.S. at 436 (Harlan, J., concurring in the judgment).

Before this Court faced the matter of confessions obtained through custodial interrogation in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), the coercive reality of normal police practices had been ignored, and as a result those practices mocked the requirements of "voluntary" confession uniformly announced in judicial opinions. *See Miranda,* 384 U.S. at 445-456. Unless the issue of regulatory compulsion is faced here, there is the same danger of government practices steadily increasing their distance from constitutional principles, until the Fifth Amendment protection against the inquisitorial use of government power is worthless in the regulatory context.

C. The government never faces the issue identified as crucial in *California* v. *Byers,* 402 U.S. 424 (1971): the balance between the regulatory need for information and the individual interest in avoiding self-incrimination. The highly questionable concept of materiality on which the Government's case on the

labor issue rests, and the directly incriminating nature of the required admissions, should make this balance clear. Pet. pp. 18-24. It is important for this Court to deal with the issue in part because the government and the court of appeals have, contrary to *Byers,* ignored it completely.

II. DEFINITION OF MATERIALITY

As should be clear from the discussion above, the definition of materiality under the securities laws—particularly as applied to an omission—has been a central issue in this case from the beginning. The petitioners' claims relating to self-incrimination can neither be resolved nor avoided unless the issue of proper construction of "materiality" under the federal securities acts is faced. As such, the materiality issue, including the erroneous charge of the trial court and erroneous construction by the court of appeals, should be regarded as properly before this court on several grounds.

A. It is proper to face the materiality issue fully in order to construe both the statute at issue, 15 U.S.C. § 77q, and the prior opinion of this Court in *TSC Industries, Inc.* v. *Northway,* 426 U.S. 438 (1977), so that the Court may avoid decision of the constitutional issues by a limiting interpretation of the statutory duty imposed on the petitioners. *See, e.g., Boynton* v. *Virginia,* 364 U.S. 454, 457 (1960) (case decided on previously unraised statutory grounds in order to avoid necessity for decision on constitutional issues).

B. Like the indictment in *Silber* v. *United States,* 370 U.S. 717 (1962), the instruction by the trial court below was in direct conflict with a recent holding of

this Court. As this Court found in *Silber,* the failure to raise the issue below should not preclude reversal of "plain error" such as this. Rule 40(1)(d)(2) of the Rules of this Court. The government's labored explanation of how the phrase "would or might" in the instruction below really means "would" cannot erase the flat conflict between the instruction below and this Court's holding in *TSC Industries, Inc.* v. *Northway,* 426 U.S. 438 (1977). If the *TSC* ruling is to be at all enforceable, its application cannot depend on strained attempts to extract, from lengthy instructions, intimations which might conceivably counteract the disapproved effect of the "might" language actually used by the trial court.

The crucial importance of jury instructions in criminal matters has often led this Court to invoke the "plain error" rule to review erroneous trial instructions not complained of below. *See, e.g., Pipefitters Local Union No. 562* v. *United States,* 407 U.S. 385, 440-442 (1972); *Terminiello* v. *Chicago,* 337 U.S. 1, 5, 6 (1949); *United Brotherhood of Carpenters & Joiners of America* v. *United States,* 330 U.S. 395, 411, 412 (1947).

C. The "would or might" instruction of the trial court clearly expands the duty to report beyond the limits set in the *TSC* case and, in the circumstances here, this instruction contributed to a finding of materiality which makes the reach of the petitioners' statutory duty to report unconstitutional. In these circumstances, review of the charge, as well as review of the construction by the court of appeals of the materiality requirement, should be proper because of the relevance to the properly raised constitutional claim. *See United States* v. *Speers,* 382 U.S. 266 (1965).

In *Speers* this Court dealt with a complex issue regarding interpretation of section 70(c) of the Bankruptcy Act, and section 6323 of the Internal Revenue Code. The government raised in this Court an argument based on section 67(b) of the Bankruptcy Act which was not raised in the court of appeals, or before the district court or referee. This Court nonetheless held that this contention was properly before it (382 U.S. at 277, n.22):

> "The 67b argument raised in this Court differs from that rejected below, for that subsection is now cited to us as an aid in construing the relationship between 70c and 6323. Insofar as it is relevant to the particular problem of statutory construction presented by this case, we regard the 67b argument as properly before us, for 'Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived.'" (Citations omitted.)

D. Finally, because of its relationship to the constitutional issues and its importance to the proper scope of the securities acts and the power of the Securities and Exchange Commission to enforce those acts, the materiality issue is a fundamentally important question both in the context of this case and beyond. As such it warrants review by this Court under Rule 23(1)(c) of this Court's Rules.

Though the circumstances are very different, the considerations favoring review of the materiality issues here are very similar to those enunciated by this Court in *Connor* v. *Finch*, 431 U.S. 407 (1977). *Connor* involved a challenge to reapportionment plans promulgated by a district court for the Mississippi legislature. The petitioners challenged the Senate plan as a whole, but only challenged some of the districts in the House plan. Nonetheless this Court decided to consider and overturn the House plan as a whole, noting that the validity of the plan could be viewed as raised by implication and emphasizing, moreover, the general "duty in exceptional circumstances" to review federal court errors not raised below when those errors "seriously affect the fairness, integrity or public reputation of public proceedings." 431 U.S. at 421, n.19. Both factors are present here, where determination of the materiality issues is central to a determination of the constitutional ones, and where the instruction below, in direct conflict with a recent holding of this Court, allowed materiality and guilt to be determined on the basis of a "mere possibility" (*TSC, supra*, 426 U.S. at 448-449) that the information in question would affect investment decisions. The fundamental integrity of both judicial and administrative processes are affected, to the detriment not only of these petitioners, but of other individuals who seek to comply with, or are prosecuted under, the securities laws.[4]

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[4] It has been clear from the outset of this case that the gist of the petitioners' constitutional defense on the labor relations issue is that the concept of materiality cannot be stretched to require that they explicitly incriminate themselves in filings under the securities acts. This issue has been pressed and contested in various formulations at every level of this proceeding, from the pretrial motion to strike paragraph sixteen of the indictment through the court of appeals to the petition for a writ of certiorari. There is certainly no undue prejudice to the Government in consideration of the issue. As this Court stated in *Perma Life Mufflers, Inc.* v. *International Parts Corporation*, 392 U.S. 134, 142 (1968), in upholding the right of the petitioner there to urge alternative theories of antitrust conspiracy liability:

> The gist of petitioners' cause of action has been clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely on these alternative theories of conspiracy.

III. THE PREJUDICIAL CREDIBILITY CHARGE

The government contends that the instruction given by the trial court on the credibility of witnesses was "entirely proper." (Brief in Opp. p. 8.)[5] This conclusion rests on the assumption that the first section of the contested charge was no more than "a general instruction on credibility" and that the second section of the charge was "standard and unobjectionable." (*Id.*) This assumption is belied by the facts. The trial court's charge included the prejudicial statement that "I think it is reasonably safe to suggest that you heard more than once perjury from the witness stand in this case." (A. 657.) This statement goes far beyond a "general instruction on credibility." The second part of the charge indicated to the jury that defendants had "deep and profound and abiding interest in the outcome of the case." (A. 659-60.) Taken together, these two sections of the charge are not "entirely proper" because a trial court's "lightest word or intimation is received with deference, and may prove controlling," *Starr* v. *United States,* 153 U.S. 614, 626 (1894), and the impact of the trial judge on the jury is great. *Quercia* v. *United States,* 289 U.S. 466, 470 (1933). The Government has not properly faced the rule of *Quercia* or the conflict between the court below and the Fifth

[5] The government does not contend that this question is not properly before this Court, but only that petitioners did not object to the instruction in the trial court, and could not have, because it was "wholly unobjectionable." (Brief in Opp., p. 8.)

Circuit.[6] Reversal is required because as this Court stated in *Quercia,* "hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf." *Id.*

IV. THE USE OF YANOWITCH'S NOLO CONTENDERE PLEA

The government does not respond at all to petitioners' contention that use of petitioner Yanowitch's plea of nolo contendere (the conviction was later withdrawn although recently reinstated) for purposes of impeachment was incorrect, nor could it.[7] *Cf. Mickler* v. *Fahs,* 243 F.2d 515, 517 (5th Cir. 1957). The very name of the plea "nolo contendere" means only "I do not contest." *Piassick* v. *United States,* 253 F.2d 658 (5th Cir. 1958). The plea is not a judicial admission, nor even a prior inconsistent statement of culpability, and it cannot be used as such. (See Pet. p. 40, n.50.)

[6] The Government contends that petitioners' reliance on *United States* v. *Cisneros,* 491 F.2d 1068 (5th Cir. 1974), and *United States* v. *Fischer,* 531 F.2d 783 (5th Cir 1976), is misplaced because each involved "extreme situations where the trial judge's comments served as a direction to the jury to ignore the testimony of the witnesses for the defense." (Brief in Opp. p. 6, n.5.) Yet this is exactly what the charge in this case directed the jury to do, particularly when combined with an instruction stressing the likelihood that the government's immunized witnesses were testifying truthfully.

[7] Petitioners raised the issue of the admissibility of David Stirling's plea of guilty and Harold Yanowitch's plea of nolo contendere in the court of appeals when they moved for dismissal of the appeal without prejudice and for remand of the case. (Pet. App. A, p. 36a, n. 15.) Petitioners raised the issue with the trial court before, at and during trial. (Tr. 20-21, 2884-2888, 3348-3354, 4107-4111, 4185.)

A. The ruling of the court below that the plea of nolo contendere was admissible for impeachment conflicts with the view of the Fifth Circuit. *United States* v. *Morrow,* 537 F.2d 120, 141-145 (5th Cir.), *rehearing denied,* 541 F.2d 282 (5th Cir. 1976).

B. Most importantly, the ruling of the court below vitiates the ability of a defendant to choose a nolo contendere plea, a plea expressly permitted by the federal rules. The ruling permitted the government by indirection to use a plea for impeachment as an admission when it could not be used as an admission directly,[8] and allowed petitioner Yanowitch to be intimidated from exercising the right to testify on his own behalf.

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[8] *See also Kilgore* v. *United States,* 467 F.2d 22, 27-29 (5th Cir. 1972) (in a tax refund suit, plaintiff's reputation witness could be asked on cross examination if he had heard that plaintiff had pleaded nolo contendere in the prior criminal tax fraud case, but the court noted that the result would be different if the question was put to the criminal defendant himself); *Mickler* v. *Fahs,* 243 F.2d 515 (5th Cir. 1957) (questioning of defendant about prior plea of nolo contendere, after objection, and despite instruction that question should be ignored for all purposes, held reversible error); and *Piassick* v. *United States,* 253 F.2d 658 (5th Cir. 1958) (admission of question about conviction based on a plea of nolo contendere, over objection, and despite limiting instruction, held reversible error.) *See also United States* v. *Ward,* 481 F.2d 185, 186 (5th Cir. 1973); *cf. Commissioner* v. *Estate of Leyman,* 344 F.2d 763 (6th Cir. 1965), *vacated on other grounds,* 383 U.S. 832 ((1966) (copy of conviction based on plea of nolo contendere in criminal tax case admissible for impeachment of credibility in the Tax Court non-jury trial for penalties and additional taxes.)

V. THE USE OF DAVID STIRLING'S GUILTY PLEA

The guilty plea withdrawn by David Stirling has been reinstated. Whether a plea is subsequently reinstated or not, there is another issue with which the government does not deal at all. It is highly prejudicial to use for impeachment a conviction arising from the same transaction for which a defendant is later tried. *United States* v. *Martinez,* 555 F.2d 1273 (5th Cir. 1977). In *Martinez,* the defendant was on trial for conspiracy to distribute cocaine. The court held that it was an abuse of discretion to permit impeachment by a prior conviction for aiding and abetting "arising out of the identical factual circumstances and involving many of the identical elements as the offense on trial." 555 F.2d at 1277. The conviction of petition Stirling here derived from the same factual circumstances and involved the same elements (giving a thing of value to union officials) as the earlier trial. Thus, even if the plea of guilty made by petitioner Stirling and the corresponding conviction have been reinstated, the decision of the Second Circuit conflicts with the decision of the Fifth Circuit in *Martinez.*[9] It thus requires review by this Court.

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[9] In *Martinez* as here, the "defendant's right to have the jury determine that the government has properly proven every essential element beyond a reasonable doubt was improperly prejudiced by the introduction of the former conviction." *United States* v. *Martinez,* 555 F.2d at 1276-1277. These considerations are particularly cogent here where the "separate" crimes are the same in terms of the double jeopardy analysis established in *Blockburger* v. *U.S.,* 284 U.S. 299 (1932), and *Brown* v. *Ohio,* 432 U.S. 161 (1977), See Pet. pp. 22-24.

CONCLUSION

The errors summarized above were cumulative, and in the aggregate they materially affected the fairness of petitioners' trial. Review of the decision below by this Court is appropriate, and the petition should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
THOMAS F. CULLEN, JR.
LINDA K. SMITH

BERNARD S. MEYER
JEFFREY G. STARK

Attorneys for Petitioners

Of Counsel:

JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

MEYER, ENGLISH, CIANCIULLI
& PEIRIZ, P.C.
160 Mineola Boulevard
Mineola, New York 11501

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